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IN THE

# Supreme Court of the United States

OCTOBER TERM,

No. 579.

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,

*Appellant,*

*vs.*

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,

*Appellees.*

*ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.*

## MOTION TO DISMISS APPEAL, BRIEF AND APPENDIX IN SUPPORT OF MOTION TO DISMISS APPEAL.

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## TABLE OF CONTENTS.

### Contents of Brief.


| | PAGE |
|---|---|
| MOTION TO DISMISS APPEAL | 1 |
| COUNTER-STATEMENT OF QUESTIONS PRESENTED | 2 |
| COUNTER-STATEMENT OF CASE | 3 |
| ORDINANCE INVOLVED | 3 |
| ARGUMENT: | |
| I. The validity of the Allendale Zoning Ordinance in respect to off-street parking requirements for assembly buildings as applied to appellant's proposed church in a residential district presents no substantial federal question | 4 |
| II. The constitutionality of R. S. 40:55-32 and R. S. 40:55-39 present no substantial federal question | 6 |
| III. The New Jersey Courts found no factual basis to declare the Allendale ordinance unreasonable which is dispositive of the case on a non-federal basis | 9 |
| CONCLUSION | 11 |


### CASES CITED.


| | |
|---|---|
| *American Communications Assn. v. Douds*, 339 U. S. 382, 397, 398 (1950) | 2, 5 |
| *Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethal Unit, from the Decision of the Board of Adjustment of the Borough of Bethal, Allegheny Co., Pa.*, 183 Pa. Super. 219, 130 A. 2d 240 (Super. Ct. 1957), allocatur den. by Pa. Supreme Ct. (1957), appeal dismissed for want of a substantial Federal question, 355 U. S. 40 (1957) | 1, 4, 5 |

PAGE

*Corporation of Presiding Bishop* v. *Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U. S. 805; rehearing denied 338 U. S. 939 ..... 1, 4, 5, 6

*Cummins* v. *Board of Adjustment of the Borough of Leonia*, 39 N. J. Super. 452 (App. Div. 1956) ..... 11

*Monmouth Lumber Co.* v. *Ocean Township*, 9 N. J. 64 (1952) ..... 7

*Tomko* v. *Vissers*, 21 N. J. 226, 239 (1956) ..... 11

*Ward* v. *Scott*, 11 N. J. 117 (1952) ..... 7, 8

*Yanow* v. *Seven Oaks Park Inc.*, 11 N. J. 341 ..... 11

CONSTITUTION OF UNITED STATES CITED.

Amendment I ..... 2
Amendment XIV ..... 2

STATUTES CITED.

R. S. 40:55-32 ..... 6, 7
R. S. 40:55-39 ..... 2, 6, 7

Zoning Ordinance of the Borough of Allendale:
Article 4—Section 411 ..... 7
Article 6—Section 605 ..... 9
Article 6—Section 609 ..... 9
Article 15—Section 1501 ..... 7
Article 15—Section 1502 ..... 7

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**Contents of Appendix.**

Exhibit D-1—Ordinance Borough of Allendale ..... 1a

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OCTOBER TERM,

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Appellant,

*vs.*

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,
Appellees.

## Motion to Dismiss Appeal.

Appellees, Borough of Allendale, New Jersey, and Edwin W. Grosman and Board of Adjustment of the Borough of Allendale, by their counsel, hereby move that this appeal be dismissed on the following grounds:

1. No substantial federal question is presented.

(*Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethal Unit, from the Decision of the Board of Adjustment of the Borough of Bethal, Allegheny Co., Pa.*, 183 Pa. Super. 219, 130 A. 2d 240 (Super. Ct. 1957), allocatur den, by Pa. Supreme Ct. (1957), appeal dismissed for want of a substantial Federal question, 355 U. S. 40 (1957).)

(*Corporation of Presiding Bishop* v. *Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U. S. 805; rehearing denied 338 U. S.

939. Dismissal explained in *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 397, 398 (1950).)

2. The judgment rests upon adequate non-federal grounds.

Printed herewith is Appellees' Brief in Support of Motion to Dismiss Appeal.

## Counter-statement of Questions Presented.

A. Where a municipal zoning ordinance expressly permits churches to be erected in all zones in the Borough, including an "AA Residential Zone", but requires that all places of assembly, including churches, must meet off-street parking requirements, are such requirements as applied to a church contrary to the First and Fourteenth Amendments of the Constitution of the United States?

B. Where Appellant concedes its non-compliance with the applicable ordinance and did not seek a variance from its terms as required by R. S. 40:55-39, but bases its contentions solely on an alleged prohibition against churches by reason of off-street parking requirements of the zoning ordinance, is there a substantial federal question regarding the validity of a State statute or municipal ordinance presented?

C. Where Appellant was offered the opportunity below to present additional evidence regarding the reasonableness of the ordinance parking requirements and failed to avail itself of this opportunity, and no evidence was offered as to the unreasonableness of the ordinance is not this dispositive of the case on adequate non-federal grounds?

## Counter-statement of the Case.

The statement of the case, including a summary of material facts, is adequately included in the opinion of the Supreme Court of New Jersey which is incorporated in Appellant's Appendix "A" at pages 16 to 22.

## Ordinance Involved.

Portions of the ordinance concerned are printed in the transcript of the record docketed in the Supreme Court of the State of New Jersey as "Appendix to Brief for Appellant" at pages 294a to 299a, copies of which have been furnished to this Court as indicated by Appellant's Statement as to Jurisdiction (J. S. 2). Appellant has omitted pertinent provisions of the ordinance involved. Accordingly, Appellees have added Sections 606 to 611, the remaining provisions of the parking ordinance and have printed same herein (see Appendix 1 this Brief).

# ARGUMENT.

## I.

**The validity of the Allendale Zoning Ordinance in respect to off-street parking requirements for assembly buildings as applied to appellant's proposed church in a residential district presents no substantial federal question.**

The instant appeal should be dismissed because this Court has heretofore determined that the validity of off-

street parking requirements of a zoning ordinance applied uniformly to all places of assembly, including churches, presents no substantial federal question. *Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethal Unit, from the Decision of the Board of Adjustment of the Borough of Bethal, Allegheny Co., Pa.*, 183 Pa. Super. 219, 130 A. 2d 240 (Super. Ct. 1957), allocatur den. by Pa. Supreme Ct. (1957), appeal dismissed for want of a substantial Federal question, 355 U. S. 40 (1957). *Corporation of Presiding Bishop* v. *Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949); appeal dismissed 338 U. S. 805; rehearing denied 338 U. S. 939.

The *Bethal* case as noted by the Supreme Court of New Jersey in its opinion sub judice, is fully applicable here since it concerned the validity of off-street parking as applied to churches and the relationship of almost identical requirements to public safety (J. S. 21). As stated by the Pennsylvania Supreme Court (130 A. 2d at p. 243):

> "Certainly freedom of worship does not mean that churches are exempt from reasonable police power regulations. Our Supreme Court in Kurman *v.* Zoning Board of Adjustment of City of Philadelphia, 351 Pa. 247, 40 A. 2d 381 determined that setback requirements are applicable to properties used for church purposes. The concepts of religious freedom, freedom of speech and the press which are embodied in the First Amendment have never been construed as absolute rights and beyond the power of reasonable regulation under the police power. Board of Zoning Appeals of Decatur *v.* Decatur, Ind. Co. of Jehovah's Witnesses, Ind., 117 N. E. 2d 115, 123. * * *"

The dismissal of the Appellant's appeal in the *Bethal* case would appear to establish beyond question that subjecting land and buildings used by religious groups to the purview of reasonable zoning is constitutional.

The *Porterville* case involved even more stringent zoning as to churches since the use was excluded entirely from one family residential districts. This Court in commenting upon the *Porterville* case in the later case of *American Communications Ass'n* v. *Douds, supra,* said at page 397:

> "When the effect of a statute or ordinance upon the exercise of a First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring the showing of imminent danger to the security of the nation is an absurdity. *We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints *v.* City of Porterville, 1949, 338 U. S. 805." (Emphasis supplied).

Appellant in its jurisdictional statement at p. 11 attempts to distinguish the *Porterville* case by stating that "the case did not involve exclusion of churches from an entire municipality as here but the ordinance operated only upon a small portion of the City and prohibited churches only in one small exclusively residential area of the City". The attempted distinction is without merit since the Allendale ordinance permits churches in all districts of the Borough (Pl. Ex. 6, R295a-30; 296a-25), provided only that there be compliance with zoning requirements as to lot size,

setback, off-street parking, traffic safety and other reasonable regulations. The impact of the Allendale ordinance upon church buildings is obviously milder than that of the ordinance involved in the *Porterville* case. It would appear that the ordinance sub judice is a fortiori valid and constitutional.

The Appellant here in reality seeks discrimination in favor of churches in zoning matters by reason only of the religious character and purpose of the structure involved. This was the basis of the Appellant's case before the Supreme Court of New Jersey. That Court decided that Appellant's contentions in respect to an abridgment of the First Amendment freedoms were not meritorious, and determined that the Allendale ordinance applied uniformly to all assembly buildings and was designed to promote public safety and the general welfare by lessening traffic congestion (J. S. 19).

## II.

### The constitutionality of R. S. 40:55-32 and R. S. 40:55-39 present no substantial federal question.

The Supreme Court of New Jersey, in its opinion rendered in this case, observed that the Appellant did not seek a variance from the terms of the parking ordinance but rather based its attack solely upon the alleged unconstitutionality of the ordinance by reason of Appellant's status as a religious community (J. S. 18). Appellant further contends that the action of the Allendale Board of Adjustment in enforcing the zoning ordinance in respect to parking provisions is unconstitutional. The Board of Adjust-

ment is, of course, bound to enforce all provisions of the Borough zoning ordinance unless its discretion to grant a variance is properly invoked by presentation of evidence of hardship in accordance with the standards set forth in R. S. 40:55-39. In this connection the Appellant attacks the Enabling Acts under which the Board of Adjustment functions (R. S. 40:55-32 and R. S. 40:55-39) and those sections of the Allendale zoning ordinance expressing at a municipal level the powers and purposes of the aforesaid Enabling Acts. (Sections 411, 1501, 1502 of the Allendale Zoning Ordinance). (Pl. Ex. 6, R294a, 296a, 297a).

The constitutionality of R. S. 40:55-32 and R. S. 40:55-39 was considered at length by the Supreme Court of New Jersey in *Monmouth Lumber Co.* v. *Ocean Township*, 9 N. J. 64, 87 A. (2) 9 (1952), and *Ward* v. *Scott*, 11 N. J. 117, 93 A. (2) 385 (1952): In these cases the Court emphatically determined the sufficiency of these statutory enactments in establishing standards for the exercise of the powers granted and that such standards met constitutional requirements. In so finding the Court, in the *Ward* case, by Mr. Justice Jacobs at page 125, said:

> "• • • Applying the above to the terms of our Zoning Act, we find that the Legislature has not in any sense granted uncontrolled power to the administrative agency. It expressly set forth in R. S. 40:55-32 the proper zoning purposes to be achieved including the lessening of congestion, the securing of safety from fire, panic and other dangers, the providing of adequate light and the prevention of over-crowding, the avoidance of undue concentration of population, and the promoting of health, morals or general welfare. It recognized that comprehen-

> sive restrictive regulations designed to carry out these goals, if rigidly and literally enforced without any opportunity whatever for relief in special situations, might result in serious injustice or impairment of the underlying public purposes; accordingly, it wisely adopted the policy expressed in R. S. 40:55-39 which enables individual variances consistent with the public interest and the purposes of the zone plan and zoning ordinance. With equal wisdom it provided specific safeguards to insure against unwarranted or arbitrary action and untrammeled administrative discretion."

and again at page 127:

> "* * * Nor do we see any real danger that unwarranted or arbitrary action will successfully survive the ample safeguards which are ever available * * *".
>
> "* * * It seems clear to us that sympathetic consideration of the applicable legal principles in the light of the problems confronting the Legislature in its endeavor to deal fairly and effectively with the entire zoning field dictates the conclusion that R. S. 40:55-39 (d), as construed in the Monmouth Lumber case, embodies governing standards sufficient to withstand the constitutional attack advanced by the appellant * * *".

It would appear that the Appellant's constitutional argument as to the Board of Adjustment powers granted by the aforesaid Legislative Acts is based upon the same contention of immunity of church groups by reason of their religious character which was the basis of its attack on the off-street parking requirements of the zoning ordinance.

## III.

**The New Jersey courts found no factual basis to declare the Allendale Ordinance unreasonable which is dispositive of the case on a non-federal basis.**

Plans submitted with Appellant's application for a building permit indicate a proposed church building designed to accommodate 150 persons (R29a-30). Appellant concedes there would be permanent seating installed on the premises to accommodate such a group. The proposed building plan indicates a floor area of 3460 square feet, including attic and basement (R85a-40). 2800 square feet constitutes the main floor area (R85a-10). The proposed parking area indicates a net footage of 4340 square feet (R86a-5), including 30 parking stalls (R85a-30) of 144 square feet each (R129a-30), with the negligible balance of the footage apparently being allotted to driveways. Testimony at the Board of Adjustment hearing indicated the impracticality of these measurements since they would prohibit movement within the parking area, as well as ingress and egress (R16a-25, R159a-160a).

Section 605 of the Allendale ordinance requires a useable parking area for one motor vehicle for each three installed seats (Pl. Ex. 6, R298a-35). Section 609 of the ordinance requires each parking stall to be 200 square feet, exclusive of driveways (Appendix I this brief, page 6a). Expert testimony from Appellee's witnesses, and in part from Appellant's; verified the reasonableness of these requirements (R204a; R72a-10). Applying sections 605 and 609 to the appellant's proposed structure would require a parking

area sufficient to accommodate fifty vehicles (150 installed seats) or an area of 10,000 square feet plus additional footage for driveways. The record does not appear to support Appellant's statement that they were required to provide a parking area of 43,200 square feet or even 28,000 square feet (J. S. 7).

At the trial before the law division of the Superior Court of New Jersey Appellant admitted its non-compliance with the ordinance (R362a-35). The Trial Judge, during the course of the trial and in his opinion rendered from the Bench at the conclusion of the case indicated that he considered the only question of any possible merit before him was the reasonableness of the ordinance parking requirements (R347a-20). He pointed out that there was no evidence before him as to the unreasonableness of the ordinance, and therefore, afforded Appellant an opportunity to present such evidence (R348a). Appellant failed to avail itself of the afforded opportunity and in the absence of a showing of unreasonableness the Appellant's application was denied (R350a-20). The Supreme Court of New Jersey affirmed the position of the Trial Judge (J. S. 18). Appellees now submit that the case can be disposed of on this ground alone.

It is axiomatic that a zoning ordinance is presumptively valid and reasonable and that the burden is upon the one who attacks the ordinance to show clearly that it is unreasonable. This rule is well settled in New Jersey and the presumption of validity attaches not only to the ordinance but also to the action of local administrative groups such as the Board of Adjustment in enforcing the ordinance and in the exercise of the expert discretion vested in such

Boards by the Legislature of the State of New Jersey. *Tomko* v. *Vissers*, 21 N. J. 226, 239, 121 A. (2) 502 (1956); *Cummins* v. *Board of Adjustment of the Borough of Leonia*, 39 N. J. Super. 452, 121 A. (2) 405 (App. Div. 1956); *Vanow* v. *Seven Oaks Park Inc.*, 11 N. J. 341, 36 A. (2) 639 (1953).

## Conclusion.

**We submit that this appeal should be dismissed for want of substantiality and by reason of adequate non-federal grounds.**

Respectfully submitted,

GERALD MONOGHAN,

LEVDEN & MONOGHAN,

GEORGE WINNE,

Counsels for Appellees.

# APPENDIX I.

## Exhibit D-1.

### Borough of Allendale.

NOTICE

NOTICE IS HEREBY GIVEN that the following proposed ordinance was introduced and passed on first reading at a regular meeting of the Governing Body of the Borough of Allendale, Bergen County, New Jersey, held on the 10th day of October 1957, and that said ordinance will be taken up for further consideration for final passage at a meeting of said Governing Body to be held at its meeting room in the War Memorial Building, at Allendale, New Jersey, on the 24th day of October, 1957, at 8:30 P. M. or as soon thereafter as the matter can be reached, at which time and place all persons who may be interested therein will be given an opportunity to be heard concerning the same.

J. FRANK ROUAULT,
Borough Clerk.

The ordinance referred to is as follows:

ORDINANCE

"AN ORDINANCE TO AMEND AN ORDINANCE ENTITLED 'AN ORDINANCE LIMITING AND RESTRICTING TO SPECIFIED DISTRICTS AND REGULATING THEREIN BUILDINGS AND STRUCTURES, ACCORDING TO THEIR CONSTRUCTION AND THE VOLUME AND EXTENT OF THEIR USE; REGULATING AND RESTRICTING THE HEIGHT, NUMBER OF STORIES AND SIZE OF BUILDINGS AND OTHER STRUCTURES; REGULATING AND RESTRICTING THE PERCENTAGE OF LOT OCCUPIED, THE SIZE OF YARDS, COURTS AND OTHER OPEN SPACES, AND THE DENSITY OF POPULATION; REGULATING AND RESTRICTING THE LOCATION, USE

*Exhibit D-1.*

AND EXTENT OF USE OF BUILDINGS AND STRUCTURES FOR TRADE, INDUSTRY, RESIDENCE AND OTHER PURPOSES; AND TO REGULATE THE USE OF LAND, ESTABLISHING A BOARD OF ADJUSTMENT, AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.' ''

BE IT ORDAINED BY THE GOVERNING BODY OF THE BOROUGH OF ALLENDALE, AS FOLLOWS:

Section 1, Article 6—Parking, of the Ordinance known as "The Zoning Ordinance of Allandale, New Jersey" is hereby repealed and replaced by the following:

This amendment shall be known and designated as Article 6A—Parking.

601. Off-street parking facilities for motor vehicles shall be provided in connection with the use of any property in any zone within the Borough of Allendale where the land or building therein is intended to be used in whole or part as a hotel, theatre, auditorium, restaurant, hospital sanitarium, church, or a place of public assembly, or for any purpose likely to attract persons using motor vehicles. Provision shall be made for usable, off-street parking space for each new dwelling unit.

Such facilities shall be provided for in accordance with the requirements of this ordinance, upon any plans or specifications required to be filed under the provisions of any ordinance of the Borough.

602. LOCATION. Off-street parking facilities shall be located as hereinafter specified.

a. For all residential buildings and for all non-residential buildings in residential zones, required parking shall be provided on the same plot with the building, or on a plot or plots contiguous therewith.

*Exhibit D-1.*

b. For commercial and all non-residential uses in business zones required parking shall be provided within 300 feet, measured from the most distant point of the parking facility to the nearest point for the building that such facility is required to serve.

c. For industrial uses required parking shall be provided on the same plot with the building.

d. In industrial zones, required parking space shall be provided not less than forty feet from the street. In residential zones, parking space shall be behind the set-back lines.

603. For a structure used or to be used for retail or wholesale mercantile establishments to be used by the general public, there shall be provided a usable area for off-street parking equivalent to two (2) square feet of parking space for each square foot of gross floor area of such structure.

604. For buildings used or to be used for office or professional purposes, there shall be provided a usable area for off-street parking equivalent in area to one (1) square foot of parking space for each square foot of gross floor area of that portion of such structure used for office or professional purposes.

605. For buildings intended to be used in whole or part as a theatre, auditorium, restaurant, hospital sanitarium, church or other place of public assembly or any similar purpose likely to attract a number of persons using motor vehicles, there shall be provided a usable area for off-street parking for one motor vehicle for each three seats installed or usable in the portion of such building used for any of the purposes stated in this section, plus one space for each person resident on the premises and additional

space equal in number to 75% of the employees of such establishment. Additional parking area shall be provided for any portion used for other purposes as required by the other sections of this ordinance.

In determining seating capacity for computing parking requirements, there shall be counted such seats as are bolted or attached to the floor of the building. If seating capacity shall be of the bleacher type, the capacity shall be determined by allowing 2½ lineal feet of bleacher space as measured on the longitudinal axis of such seats, as one seating space. If there be no permanent seats or bleachers, or if area is provided for portable seats, the calculation for the necessary parking requirements shall be made by the Building Inspector or his authorized or designated representative using the following table as a guide.

PARKING AREA REQUIREMENT

| Principal Purpose | Square Feet of Parking Area per Square Foot of Usable Building Area |
|---|---|
| Assembly with fixed seats | 10 |
| Assembly without fixed seats | 5 |
| Business buildings | 1 |
| Court Rooms | 2 |
| Dance halls, lodge rooms | 5 |
| Hotel, lodging houses, multi-family dwellings | 1 |
| Institutional buildings | 1 |
| Storage buildings | 0.5 |

606. NON-RESIDENTIAL OFF-STREET PARKING. Provisions shall be made for two square feet of total parking area for each square foot of gross floor area for all new non-residential buildings or additions to such buildings in all zone districts except as otherwise provided in this ordinance.

*Exhibit D-1.*

Parking area must be provided to accommodate any commercial vehicles required for conduct of the use. Such area to be in addition to that provided in accordance with this ordinance. The provisions of b, c, d and e of Section 607 of this ordinance shall also apply.

607. PARKING AREAS FOR NON-RESIDENTIAL USE IN RESIDENCE ZONES. Subject to the approval of the Board of Adjustment.

Off-street parking is permitted in the Commercial and Industrial Zones, and in the Residential zones within one hundred and twenty feet on all Commercial and Industrial zones provided such parking areas,

a. Extend continuously from the business or industrial zone,

b. Are provided with a paved surface as prescribed in Section 610,

c. Are bounded where they adjoin residential areas by a curbing of height at least seven inches above the paved surface and which is at least seven feet from the lot boundary.

d. Are landscaped where they adjoin residential areas according to one of the following alternatives:

1. A dense planting of evergreen shrubs or trees at least four feet high, either alone or in combination with a wire or wooden fence.

2. A solid fence of wood or masonry four feet high with the balance of the set-back area attractively landscaped.

e. Are provided with entrances and exits at least ten feet wide, but not more than fifteen feet wide and preferably separate from each other. If not physically separated, the entrance way and exit shall be clearly indicated by appropriate painted pavement markings.

*Exhibit D-1.*

608. (a) "Usable floor area" shall be construed to mean the area open to general public use including the space occupied by counters, display booths, cashier's and office facilities, rest rooms for customers and similar customer uses, but not including the space occupied for heating or ventilating systems; facilities for storing or preparing merchandise for public display, or space permanently designed for use in the operation of the building.

(b) "Gross floor area" shall be construed to mean the total floor area of the building as measured by the interior dimensions contained within the outside walls on all floors.

(c) "Usable area for off-street parking" shall be construed to mean the area set apart for actual parking purposes behind the setback as provided in Section 602, d.

609. An area of 200 square feet, exclusive of driveways, is hereby determined as the minimum space necessary for the parking of a single motor vehicle.

610. In addition to the requirements prescribed in Section 607, all parking areas for non-residential use shall provide,

(a) A four inch surface of concrete, asphalt, bituminous cement, binder pavement, and graded so as to dispose of all surface water.

(b) A concrete curb at least seven inches above the paved surface shall be provided parallel to the street property line and arranged so as to prevent over-hang from any vehicle extending over the paved portion of the sidewalk.

(c) Parking areas adjoining buildings which are for public use should be separated from the building by a sidewalk five feet in width bounded by a concrete curb at least seven (7) inches above the paved surface.

*Exhibit D-1.*

(d) No signs, other than "entrance" "exit" or condition of use signs, shall be maintained.

(e) Any parking area lighting shall be so arranged as to direct the light away from all adjoining buildings, residence districts, or streets.

(f) Off-street parking areas shall be used solely for the parking of vehicles and no commercial repair work or service of any kind shall be conducted on such parking lots.

611. Upon completion of any non-residential parking area complying with the provisions of this ordinance the Building Inspector shall issue a Use Permit, which shall be revoked if the requirements are no longer complied with. No Occupancy Permit shall be valid in the absence of a valid Use Permit for the required parking area.

No parking space shall be reduced in area when once established without special permit from the Building Inspector, which permit shall only be issued when the reduced area complies with the provisions hereof.

612. Community Parking. The provisions of this Article may be met by participation in a community parking program designed to serve a larger area, provided plans for such community parking have been approved by the Planning Board.

Section 2. This ordinance shall take effect upon passage and publication as required by law.

Oct. 13, 1957.